Supreme Court, U.S.
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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

Docket No. 71-328

~~TEXAS GULF SULPHUR COMPANY, a Texas corporation, CHARLES F. FOGARTY, RICHARD D. MOLLISON, RICHARD H. CLAYTON, WALTER HOLYK, KENNETH H. DARKE, DAVID M. CRAWFORD, CLAUDE O. STEPHENS,~~ EARL L. HUNTINGTON ~~and HAROLD B. KLINE,~~

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Warren E. Burger, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Earl L. Huntington, respectfully prays that a writ of certiorari issue to review the judgments and opinions of the Court of Appeals entered in this proceeding on December 9, 1968 and on June 10, 1971. This is a companion petition to others on behalf of other defendants in an action brought by the Securities and Exchange Commission ("SEC") against Texas Gulf Sulphur Company ("Texas Gulf") et al.

OPINIONS BELOW

The first opinion, en banc, of the Court of Appeals which remanded for further proceedings appears at 401 F.2d 833 and at p. 66a in the separately bound Appendix;*/ the second opinion, not yet reported, appears in the Appendix, p. 220a. The first opinion of the District Court for the Southern District of New York (Bonsal, D.J.) is found at 258 F. Supp. 262 (Appendix, p. 1a) and the second opinion, after remand by the Court of Appeals, is found at 312 F. Supp. 77 (Appendix, p. 175a).

JURISDICTION

The judgments of the Court of Appeals were entered on December 9, 1968 and June 10, 1971, respectively, and this petition for certiorari was filed within ninety days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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*/ The Appendix is common to all of the petitioners now involved in the Texas Gulf case and has been filed by the petitioners in the companion petition of Texas Gulf et al.

QUESTIONS PRESENTED

1. Whether information is "material" if it would not be significant to the average prudent investor and would not have a substantial impact on the market price of the stock?

2. Whether it was error for the Court of Appeals to reject findings of the District Court, based on the essentially uncontradicted testimony of expert witnesses, as to the significance of the first drill hole (K-55-1)?

3. Whether it was error for the Court of Appeals to reject the finding of the District Court that petitioner, in any event, did not have material undisclosed information?

4. Whether Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act") and Rule 10b-5 thereunder forbid investment by a corporate employee in the securities of his employer through the facilities of a national securities exchange if, arguendo, such employee possesses material information which has not been publicly disclosed?

5. Whether Rule 10b-5, as construed and applied by the Court below, gave "fair warning" to petitioner as required by the Fifth Amendment that his purchases of stock would be unlawful?

6. Whether the Court of Appeals erred in rendering its initial decision en banc where a statutory quorum of the en banc court did not hear oral argument?

7. Whether the SEC under its statutory authority to seek injunctions from the federal courts may obtain the remedy of monetary forfeiture?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment V, set forth in Appendix B to the petition of Texas Gulf et al.

48 Stat. 891, 899, 902, 904; 15 U.S.C. §§78-(j)(b), 78u(e), 78aa, 78ff, set forth in Appendix B to the petition of Texas Gulf et al.

17 C.F.R. §§240.10b-5 and 240.12b-2(j), set forth in Appendix B to the petition of Texas Gulf et al.

STATEMENT OF THE CASE

The Commission's Charges

Petitioner, in this well-known action by the SEC against Texas Gulf and certain of its directors, officers, and employees, was charged with violating Rule 10b-5 in his purchase of 50 shares of Texas Gulf stock on February 26, 1964 and a six-month call on 100 shares of Texas Gulf stock on March 16, 1964. The purchases were made during a period of mineral exploration activities of Texas Gulf near Timmins, Ontario, which started in late 1963. One diamond drill hole (K-55-1), containing zinc-copper-silver mineralization, had been drilled prior to petitioner's purchases. Drilling work was suspended after the first hole until March 31, 1964. The SEC claimed that petitioner made his purchases with knowledge of material facts concerning the results of the drilling at a time such facts were not generally known to the investing public in violation of Rule 10b-5.

The Prior Proceedings and Factual Setting

Most of the testimony at the four-week trial dealt with the significance of exploratory drilling in Kidd Township, Ontario, Canada, in late 1963 and early 1964. The testimony included inquiry into the geology of the area, geophysical data in the form of electromagnetic surveys, geologists logs, assay reports and examination of drill core. In addition to Texas Gulf personnel, nine geologists, geophysicists or mining engineers and two security analysts testified. Numerous technical exhibits and several demonstrative charts were considered by the trial judge.

The District Court found that petitioner Huntington had no detailed knowledge as to the work and hence was not in possession of material information. (27a) The District Court also found that "the results of K-55-1 were too 'remote' when considered in light of the size of TGS, the scope of its activities, and the number of its outstanding shares, to have had any significant impact on the market, i.e., to be deemed material." (30a)

The majority of the Court of Appeals, over vigorous dissent, and on the assumption that Rule 52(a) of the Federal Rules of Civil Procedure did not apply, held that the results of the first hole did constitute material information. It went on to say as to petitioner, in further disregard of Rule 52(a) (95a):

> With reference to Mr. Huntington, the trial court found that he "had no detailed knowledge as to the work" on the Kidd-55 segment, 258 F. Supp. 281. Nevertheless, the evidence shows that he knew about and participated in TGS's land acquisition

program which followed the receipt of the K-55-1 drilling results, and that on February 26, 1964 he purchased 50 shares of TGS stock. Later, on March 16, he helped prepare a letter for Dr. Holyk's signature in which TGS made a substantial offer for lands near K-55-1, and on the same day he, who had never before purchased calls on any stock, purchased a call on 100 shares of TGS stock. We are satisfied that these purchases in February and March, coupled with his readily inferable and probably reliable, understanding of the highly favorable nature of preliminary operations on the Kidd segment, demonstrate that Huntington possessed material inside information such as to make his purchase violative of the Rule and the Act. */

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*/ The March 16, 1964 letter referred to by the Court of Appeals offered $57,000 for a 10 percent interest retained by the optionor of the 160 acre tract on which K-55-1 was drilled plus the exercise price of $18,000 for a total of $75,000 for fee simple title to the property. The relevant testimony of Mr. Huntington was printed in a Joint Appendix for the court below and is reproduced as an addendum to this petition.

On remand, the trial judge, after refusing to grant an injunction, stated as to petitioner (208a):

> Huntington - Defendant Huntington was a lawyer employed by TGS. During the period of nondisclosure, Huntington made the following purchases:
>
> | Date of Purchase | Shares Number | Shares Price | Calls Number of Shares | Calls Cost of Exercise |
> |---|---|---|---|---|
> | 2/26/64 | 50 | 23-1/4 | | |
> | 3/16/64 | | | 100 | 22-3/8 |
>
> Prior to the drilling at Kidd 55, Huntington owned 50 shares of TGS stock.
>
> Huntington purchased a total of 50 shares and calls on 100 shares. Under the SEC formula, his cost is figured at $3,755.69. The price on April 17, 1964 was $6,056.25, and Huntington will be directed to pay the difference of $2,300.56 to TGS.

Judgment was entered accordingly, with interest from April 17, 1964 which was affirmed by the Court of Appeals.

Petitioner paid $325 (or $3.25 per share) for the call on 100 shares of Texas Gulf stock. The closing price of Texas Gulf stock rose from $23-1/2 to $30-1/8 (an increase of $6-5/8 per share) between March 16, 1964, the date the call was purchased, and April 10, 1964, the Friday before the public announcements relating to the discovery. This increase was in line with the bull market developing in sulphur stocks generally at the time. The closing

price of Pan American Sulphur stock rose from $26 to $33-7/8 (an increase of $7-7/8 per share) during the same period, and the closing price of Freeport Sulphur Company stock rose from $36-5/8 to $38-1/2 (an increase of $1-7/8 per share).*/ On April 1, 1964, the price of elemental sulphur was increased $2 per ton thus marking the turnaround in the sulphur market. (3a)**/

REASONS FOR GRANTING THE WRIT

The most talked about and written about securities case in modern times has been the Texas Gulf case. It is the landmark case on several issues of great importance and wide application. These issues have not been but should be considered by this Court. The court below departed from proper appellate procedure and overturned or ignored the findings of the trial court contrary to Rule 52(a) of the Federal Rules of Civil Procedure.

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*/ Stock prices are from Pre-Trial Order No. 6 or the Wall Street Journal.

**/ The clear inference from the parallel action of other sulphur stocks is that the price increase in Texas Gulf's stock from March 16 until the public announcement during the week of April 13, was due to the increase in the price of sulphur.

ARGUMENT

I.

INFORMATION IS NOT MATERIAL UNLESS IT WOULD BE SIGNIFICANT TO THE AVERAGE PRUDENT INVESTOR AND WOULD HAVE A SUBSTANTIAL IMPACT ON THE MARKET PRICE OF THE SECURITY INVOLVED.

The trial judge made his findings of fact on the materiality issue using the tests stated to him by the SEC. In its Post-Trial Memorandum to Judge Bonsal, dated July 5, 1966, the SEC said (p. 33):

> The concept of a material fact has been defined in two principal and related ways. First, it is a fact of which a reasonable prudent investor would wish to be informed before making a decision to buy or sell, or alternatively it is a fact the disclosure of which can reasonably be anticipated to have a significant impact upon the market for the security involved. * * * A fact which would be material in the affairs of one company would probably not be material in the affairs of another, depending upon the relative size and financial condition of the enterprises and the nature of their business and the markets for their securities. (Emphasis added)

The above statement by the SEC was essentially in accord with Rule 12b-2(j) promulgated under the 1934 Act, which says (239a):

> (j) Material. The term "material" when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters as to which an average prudent investor ought reasonably to be informed before buying or selling the security registered. (Emphasis added)*/

Rule 12b-2(j) is as much a part of the law as Rule 10b-5. It has been the published definition of "material" under the 1934 Act since 1934. Substantially the same definition of "material" appears in rules promulgated under the 1933 Act and other Acts administered by the SEC. It has been employed hundreds of times by the SEC in adjudications, releases, forms, instructions and so on. Until the appeal in this case, the SEC never suggested any other standard of materiality.

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*/ The same definition of "material" under the 1934 Act appeared in December 1934 when the SEC adopted Form 10, the basic form for registration of securities upon national exchanges. This definition of "material" then appeared in the Instruction Book for Form 10 and was repeated in several subsequent editions of the Instruction Book. The same definition of "material" was published as part of Rule 12b-2 in the Federal Register on December 31, 1948 (13 F.R. 9321, 9322), has remained in the regulations, and is the published rule today.

In accord with the above, Judge Bonsal found that

> the results of X-55-1 were too remote when considered in light of the size of TGS, the scope of its activities, and the number of its outstanding shares, to have had any significant impact on the market, and it is deemed material. SEC v. Fashion Park, Inc., supra.

In a belated effort to escape Rule 52(a), the SEC in its appeal brief argued that the test of materiality applied by Judge Bonsal was too restrictive, notwithstanding the inconsistency of such a statement with its prior brief. The thrust of the SEC's argument on appeal is best in the second question posed in its brief, p. 2:

> Should the materiality of inside information be measured under Rule 10b-5 from the standpoint of the 'prudent' or 'conservative' investor without regard to the importance that might be attached to it by a reasonable man whose investment objectives are somewhat more speculative?

An attempt was made to explain away the language of Rule 12b-2(f) which says the term "material" is limited to information as to which an average prudent investor ought reasonably to be informed before buying or selling the security registered. In fact the published rule was cited in the SEC appellate brief. The suggestion that the issue of materiality should be decided on the basis of the reasonable speculator is flatly contrary to the [illegible]

The Court of Appeals adopted the argument in the SEC appellate brief stating that Judge Bonsal misunderstood the legal standard. (89a) After first seemingly embracing the substantial market impact test (86a), the majority of the Court of Appeals implicitly discarded it for a test based on the speculator being a reasonable investor with anything being material that "may" affect his desire to buy, sell or hold the stock and which "might" affect the price of the stock (88a, 89a). In part, the majority said (87a-88a):

> This is not to suggest, however, as did the trial court, that "the test of materiality must necessarily be a conservative one, particularly since many actions under Section 10(b) are brought on the basis of hindsight," 258 F. Supp. 262 at 280, in the sense that the materiality of facts is to be assessed solely by measuring the effect the knowledge of the facts would have upon prudent or conservative investors.
>
> * * *
>
> The speculators and chartists of Wall and Bay Streets are also "reasonable" investors entitled to the same legal protection afforded conservative traders. ***

And then, after applying its own interpretation to the geological, geophysical and drilling evidence, the majority said such information (89a):

> ...might well have affected the price of TGS stock and would certainly have been an important fact to a reasonable, if speculative,

investor in deciding whether he should buy, sell, or hold.

The statement by the majority of the Court of Appeals that the materiality of facts is not to be assessed solely by measuring the effect knowledge of the facts would have upon "prudent or conservative investors" is contrary to Rule 12(b)2-(j) which limits "material" to information which an "average prudent investor" ought reasonably to be informed. The word "conservative" is in complete harmony with an article by Arthur Fleischer, quoted by Judge Bonsal, articulating the substantial market impact test which the Court of Appeals also quoted with seeming approval. (26a, 86a)

The Court of Appeals' criticism of Judge Bonsal's statement that "information is not material merely because it would be of interest to the speculator on Bay Street or Wall Street" was also unjustified. The Bay or Wall Street speculator is not the average prudent investor. Materiality is limited to information the average prudent investor ought reasonably to know -- not what might be of interest to a speculator even though he be reasonable. This is not to say that the speculator is not entitled to the protection of Rule 10b-5. He is, but the standard for determining materiality is based on the average prudent investor, not on the Bay or Wall Street speculator.

Absurd results would follow if a lower standard of materiality were held to apply to Rule 10b-5 matters than to a prospectus, for example, as to which the average prudent investor test clearly applies. At the very time a corporation issued securities under a properly-prepared prospectus using the average prudent investor test, there could

be a Rule 10b-5 violation if a lesser standard of materiality were applied. */

Shortly after the first Court of Appeals decision, Professor Bromberg, who has written extensively about Rule 10b-5, said:

> The Second Circuit begins with Arthur Fleischer's concept that a disclosure duty exists only in "those situations which are essentially extraordinary ... and which are reasonably certain to have a substantial effect on the market price of the security". This looks like a test of materiality. But the court rapidly drops the "extraordinary" component and settles on "not only information disclosing the earnings and distribution of a company, but also those facts which affect the desire of investors to buy, sell or hold". This is given a further stretch by including speculators among the reasonable investors used for the measure of materiality. In view of the way market professionals sometimes react to relatively slight bits of information, the Court's standard seems to set a very low threshhold of materiality. (Bromberg, "Implications of Texas Gulf Sulphur", 1 The Review of Securities Regulation 985 (December 2, 1968))

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*/ The recent guidelines of the SEC for the release of information by issuers whose securities are in registration infer or imply that "material" is the same for Rule 10b-5 and registration matters. Release No. 33-5180, 36 F.R. 16506 (Aug. 21, 1971).

More recently Professor Bromberg has stated that the Second Circuit emphasized the wrong test and set a much lower standard of materiality than is appropriate. He thought it fortunate that the SEC's later pronouncements, both official and unofficial, seem to prefer the market impact test. Bromberg, "Disclosure Programs for Publically Held Companies - A Practical Guide", 1970 Duke L.J. 1139, 1156.

Significantly, in releases issued July 19, 1971 pertaining to disclosure of matters involving the environment and civil rights, the SEC merely cited its published rules when it came to defining "material". Releases Nos. 33-5170, 34-9252, 36 F.R. 13989 (July 29, 1971). This is as much as to say that the Second Circuit opinion in the Texas Gulf case on materiality should be treated as sui generis.

II.

THE COURT OF APPEALS IMPROPERLY DISREGARDED RULE 52(a) IN REVERSING THE DISTRICT COURT'S FINDINGS ON MATERIALITY.

The argument on this point in the petition of Texas Gulf et al. is adopted by petitioner and incorporated by reference. As a supplement to what is there said, reference is made to some of the comments by Professor Painter on the Rule 52(a) aspects of this case in his book, Federal Regulation of Insider Trading (1968). He says in part (p. 216):

> *** there is still a serious question of whether, in reversing the judgment, the majority was not in effect substituting

> its own evaluation of the evidence for that of the District Court and thus possibly exceedings its powers of judicial review * * *.

As to List v. Fashion Park, Inc., 340 F. 2d 457 (2d Cir.), cert. denied sub. nom., List v. Lerner, 382 U.S. 811 (1965), cited by both the District Court and Court of Appeals on the issue of materiality, Professor Painter says (p. 220):

> Although the List case involved a factual situation which was significantly different from that in Texas Gulf, it is difficult to reconcile the conclusion of the Second Circuit Court of Appeals that the District Court's determination of lack of materiality there was not "clearly erroneous" with the opposite approach it took in Texas Gulf.

In the instant case, the Court of Appeals said that Rule 52(a) was not applicable inasmuch as they agreed with the basic facts found by the trial court. Rule 52(a), the Court of Appeals said, applies only to basic, not ultimate, facts. (88a) The issue under that reasoning becomes whether the finding of the trial court that disclosure of the drilling results of the first hole (K-55-1) would not have had a significant impact on the market price of Texas Gulf stock is a finding of basic or ultimate fact. The distinction drawn by the Court of Appeals is inconsistent with the prior decisions of this Court which dictate that Judge Bonsal's market impact finding is protected by Rule 52(a). See, e.g., Commissioner v. Duberstein,

363 U.S. 278 (1960) (a gift for income tax purposes is a fact to be found by the trier of fact and the finding of fact is protected by Rule 52(a)); Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1962) (findings of negligence and laches based on proper criteria are protected by the clearly erroneous rule); Morales v. City of Galveston, 370 U.S. 165 (1962) (findings of negligence and unseaworthiness based on proper criteria are protected by the clearly erroneous rule); Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (findings as to causal relationship between a patent pool's conduct and damage claimed, inferred from circumstantial evidence, are protected by Rule 52(a)).

III.

JUDGE BONSAL'S FINDING OF FACT AS TO THE STATE OF MR. HUNTINGTON'S KNOWLEDGE WAS PROTECTED BY RULE 52(a).

As to the knowledge of Mr. Huntington, it is well settled by the decisions of this Court that findings by a trier of fact as to knowledge, motive and intent are protected by Rule 52(a). U.S. v. Yellow Cab Co., 338 U.S. 338 (1949); Morales v. City of Galveston, 370 U.S. 165 (1962); U.S. v. National Ass'n. of Real Estate Boards, 339 U.S. 485 (1950). In Commissioner v. Duberstein, 363 U.S. 278, 291 (1960), this Court held that the drawing of factual inferences from undisputed basic facts is protected by Rule 52(a).

Notwithstanding the above, the Court of Appeals rejected the finding of Judge Bonsal as to the state of Mr. Huntington's

knowledge at the time of his purchases and inferred, apparently, full knowledge of the exploration results, their significance (as viewed by the Court) and the trading of others. All of these conclusions are contrary to the true facts.

There were many reasons justifying the purchase of Texas Gulf stock at the time petitioner made his purchases, one of which was the turnaround in the sulphur market (3a, 144a). An increase in the price of sulphur was announced on April 1, 1964 reflecting the turnaround taking place in the sulphur business. There was a bull market for sulphur stocks. Other sulphur stocks rose in price along with Texas Gulf as pointed out earlier in this petition.

This case was tried on the basis that the SEC had the burden of proof. That burden of proof, since the complaint sounded in fraud, should have been one of clear and convincing evidence. The trial court's finding as to Mr. Huntington's knowledge was protected by Rule 52(a) and should have been sustained. Morales v. City of Galveston, supra.

IV.

RULE 10b-5, PROPERLY CONSTRUED, DOES NOT PROSCRIBE THE PURCHASE BY A CORPORATE EMPLOYEE OF HIS COMPANY'S STOCK IN ABSENCE OF FRAUD AND DECEIT. AS CONSTRUED AND APPLIED BY THE COURTS BELOW, RULE 10b-5 DID NOT GIVE "FAIR WARNING" TO PETITIONER AS REQUIRED BY THE FIFTH AMENDMENT.

The argument on the above points in the petition of Texas Gulf et al. is adopted by petitioner and incorporated by reference.

V.

THE COURT OF APPEALS ERRED IN RENDERING ITS INITIAL DECISION EN BANC SINCE A QUORUM OF THE EN BANC COURT DID NOT HEAR ORAL ARGUMENT.

The argument on this point in the petition of David M. Crawford is adopted by petitioner and incorporated by reference.

VI.

ASSUMING, ARGUENDO, THAT RULE 10b-5 WAS VIOLATED, IT WAS NEVERTHELESS ERROR TO GRANT A MONEY JUDGMENT AGAINST PETITIONER.

The argument on this point in the petition of Messrs. Holyk, Darke and Clayton is adopted by petitioner and incorporated by reference.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Earl L. Huntington
Pro se

September 8, 1971

(Testimony of Earl L. Huntington from Joint-Appendix in Prior Appeal.)

Harold B. Kline—for Plaintiff—Cross
Earl L. Huntington—for Plaintiff—Direct

Q. So that as of February 20, in addition to the existence of the drill hole, you knew simply that the company was interested in acquiring additional land, but you knew of none of the details of the land acquisition? A. That is correct.

Q. On February 20, at the meeting of the Stock Option Committee, Mr. Kline, did you communicate your knowledge or any part of your knowledge as to the drill hole or as to the policy of acquiring land to the two members of the committee who were present that day? A. No, sir.

• • • • •

Cross Examination by Mr. Marden:

Q. Did it cross your mind, Mr. Kline, that it would be appropriate to refer to that single drill hole at Timmins when you met with the Stock Option Committee on February 20, 1964? A. It did not cross my mind.

Q. Were you trying to conceal it from the (259) Stock Option Committee? A. No, sir.

• • • • •

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(260) EARL L. HUNTINGTON, called as a witness by the SEC, having first been duly sworn, testified as follows:

Direct Examination by Mr. Joseph:

Q. Mr. Huntington, what is your profession, sir? A. I am a lawyer.

Q. You are employed by Texas Gulf Sulphur Company? A. Yes, sir.

Q. Since what time? A. In August of 1963.

Q. Would you outline for the Court your professional background prior to that time, upon your coming with Texas Gulf, and up to the present? A. I received my LL.B at the University of Utah in 1956, was employed by the Department of Justice in Washington, D. C. from 1956 until my employment by Texas Gulf in August of 1963. While with the Department of Justice I received an LL.M Degree from Georgetown University in Washington, D. C.

The Court: What department were you in? What division or department were you in?

(261) The Witness: Initially I was with the Office of Civilian Property for approximately eight months. I then transferred to the Civil Division of the Department, in the Court of Claims Section, and was there for approximately two and a half years, handling primarily cases involving Government contracts and Government employee pay cases and miscellaneous litigation that was involved with that particular section.

In February of 1960 I transferred to the Trial Section of the Tax Division and was with the Tax Division for a little over two and a half years—no, three and a half years, until I came with Texas Gulf Sulphur Company.

The Court: All right.

Q. And it was at what point that you came to work for Texas Gulf, Mr. Huntington? A. August 5, 1963.

Q. 1963. In what capacity did you come to work for Texas Gulf? A. I came to work for Texas Gulf as a lawyer.

Q. And you have since that time been employed as an attorney in the legal department of Texas Gulf? (262) A. Yes, sir.

Q. You are so employed today? A. Yes, sir.

Q. Mr. Huntington, did you exercise any function with Texas Gulf with respect to the acquisition of land in the Timmins area? A. Yes, sir.

Q. Would it be correct to say that you were the person primarily in charge of the land acquisition problem in the legal department? A. I would prefer to restate it, if I may.

Q. Please do so. A. I had nothing to do with land acquisition until after the death of the senior counsel in the office.

The Court: Who was that?

The Witness: That was Mr. Bedichek, and he died on the 23rd of January, 1964.

The Court: You had nothing to do with it until January 23, 1964?

The Witness: That's right.

Q. What did you have to do with it thereafter? A. After Mr. Bedichek's death I was consulted initially by Dr. Holyk who sought my advice as to what (263) we should do additionally in our efforts to acquire one of the half lots of land that we wanted.

There had been substantial delay in Dr. Holyk's negotiation with a lawyer in Canada. We weren't really sure whether this particular lawyer—whether he really represented the owners of that land or not, and so finally we got our Canadian counsel to go over and talk to this lawyer and investigate who were the actual owners of that particular property.

Q. Which property was that? A. That was what we referred to as the Roberts property.

Q. Roberts? A. Roberts property.

Q. And I was with respect to the Roberts property that you were consulted upon the death of the senior counsel at [illegible]? A. Yes sir.

Q. Did you familiarize yourself at that time with the background and prior negotiations for land acquisitions in the Timmins area made from the Roberts property? A. Not [illegible].

Q. Were you aware of the identities of the remaining [illegible] at [illegible]?

The Court: What is a half lot?

The Witness: In that area of Canada the tracts of land are broken up into roughly 160 acre tracts, each of which is referred to as a half lot. It is divided into [illegible] concessions. So a half lot is 160 acres.

The Court: A half lot is 160 acres. All right.

Q. Was the property on which the initial drill hole [illegible] known as [illegible]? A. We referred to it as the Hendrie property.

Q. Were you aware at the time you were consulted by Mr. Roberts of any problems with respect to the Hendrie property? A. Yes sir.

Q. Were you consulted with respect to the Roberts property? A. Yes sir.

Q. What did you do in that connection following your discussions with Mr. Roberts with respect to the Roberts property? [illegible] A. After that—

Q. Excuse me, Mr. Hunter, you. I take it that at this time the company had no rights whatever in the so-called Roberts property? A. That is correct.

Q. Fine. Would you go on and tell the Court what you did from [illegible] on to acquire rights to that property?

A. For a period of two or three weeks we attempted to get some response out of this Canadian lawyer I referred to, and after that we had our Canadian counsel investigate the ownership of the tracts and found that there were other lawyers that represented those interests, and ultimately contacted those lawyers and arranged for the acquisition of options to buy that land, or purchase and sell agreement in one instance, from the various interests.

Q. When was the acquisition of the Roberts property consummated? When were the options acquired, all the necessary rights, so that you could acquire the land in its entirety at some later date? A. Approximately March , 1964.

(266) Q. What had been done by that time? A. We had obtained a signed purchase and sell agreement in one instance and option agreements in three other instances.

Q. Do you recall the cost of all of this acquisition to Texas Gulf?

> Mr. Marden: Objected to as immaterial, your Honor.
>
> The Court: I think I will let him answer that. I take it this has to do purely with these three options and this one purchase and sale agreement. If you remember it.

A. The option prices totaled about $4000. The purchase and sell agreement was for a total of $7500, with $1000 down, and the aggregate purchase price when the options were exercised would total approximately $45,000.

Q. Mr. Huntington, did you, during this general period of time following the death of the senior counsel, work on any other acquisition in the Timmins area besides the Roberts property? A. Yes, sir.

Q. Which property or properties were they? A. I also did some work in an effort to obtain (267) an additional agreement with T. S. Woollings Lumber Company, which was a subsidiary of the Curtis Publishing Company, to obtain an option agreement which would permit us to explore additional acreage that that company owned in Ontario, which fell roughly to the north of the lands we already had under option from Woollings.

The Court: How far was this from Timmins?

The Witness: Well, the major portion of it would have been in the neighborhood of 20 to 25 miles north of Timmins.

The Court: 20 to 25 miles north.

The Witness: That would be the start of it. It would go beyond that point.

Q. When did you begin working on this particular acquisition? A. I don't remember the exact date. I believe it was in February.

Q. Did you finally reach some agreement with the Woollings Company with respect to this property? A. We have at this point, but not—

Q. Had you by April 16, 1964? A. No, sir; at least no written agreement.

Q. Did you work at all on the acquisition of (268) the so-called Elliott property? A. No, sir.

Q. Did you work at all on anything concerning acquisition of rights to the Hendrie property? A. To the royalty interest, the 10 per cent interest.

Q. Would you describe what the particular problem was in that instance? A. The agreement on this property provided for a 10 per cent interest in the net profits of any operation.

Q. When had this agreement been entered? A. June 6, 1963.

Q. Was this an option agreement? A. Yes, sir.

Q. Reserving to the optionor a 10 per cent interest in the net profits? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. What was your function in that connection? A. There again it was essentially one of—my advice was sought by Dr. Holyk initially.

Q. When was that? (269) A. This would have been in February.

Q. Pardon me? A. In February. We thought if this proved to be anything, if it proved to be anything that we would develop, the presence of net profits interests would complicate matters, make operations more difficult to account for net profits, so we thought it would be desirable to acquire the interest if we could.

Q. Did you know what the cost of option that the company already held on the Hendrie property was?

Mr. Marden: Same objection, your Honor.

The Court: I will let him answer that, if he knows.

A. Yes, sir. The initial cost was $500.

Q. And what was the option price? A. $18,000 plus the 10 percent interest in net profits.

Q. In other words, the company would have to pay $18,000 to buy the land subject to the 10 per cent interest? A. Yes.

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(270) *By Mr. Joseph:*

Q. Mr. Huntington, I would like to show you a document which has been marked for identification as Plaintiff's Exhibit 41 and ask you if you have ever seen that document before. A. Yes, sir.

Q. Would you describe it, please? A. It is a letter dated March 16, 1964 to the Royal Trust Company, re the estate of Murray Hendrie, the substance of which is that the Texas Gulf Sulphur Company made an offer to increase the option price in the June 6, 1963 agreement to $75,000 for full title to the property.

Q. In effect, does this letter now offer $57,000 for the 10 per cent net profits interest in the land which the company at that time could acquire for $18,000? A. I think it is quite clear. I think that is substantially the effect of it.

Q. When did you first see this letter, Mr. Huntington? A. I helped prepare it.

(271) Q. You helped prepare this letter for Dr. Holyk's signature? A. Yes, sir.

Q. And it was mailed on March 16, 1964, was it? A. I assume so.

Q. It is dated March 16, 1964? A. Yes.

Q. And that is the day on which you bought a call on Texas Gulf stock, is it not, Mr. Huntington? A. Yes, sir.

Q. Tell the Court why you bought a call on the Texas Gulf stock, Mr. Huntington. A. I had noticed the price of the calls in the newspaper, saw that I could buy one for $325, and so there came a time that I bought the call.

Q. Why did you buy a call rather than actual shares of the stock of Texas Gulf Sulphur Company? A. If I could explain a little background?

Q. Please do, Mr. Huntington. A. I bought 50 shares of stock on the 26th of February. Some time after that, shortly after that, in the course of a conversation with Dr. Holyk I (272) mentioned the fact of that purchase, and as I recall the conversation he said, "Have you ever considered, in a case where you think the price for the stock of the company is going to go up, the purchase of calls? Your risk is limited to the amount you pay for the call and it gives you an option to buy the stock for the period of the option."

And a week or ten days after that—I had never heard of a call before that time. During the next week or so I saw—paid attention to the ads in the newspaper advertising calls, and on that date I made a purchase of one call for 100 shares.

(273) Q. You had had these discussions with Dr. Holyk? A. Yes, sir.

Q. Did Dr. Holyk tell you he had purchased calls of Texas Gulf stock? A. No.

Q. Did he tell you his wife had? A. At some point I heard that his wife had bought calls on one or two hundred shares, but I don't recall when it was.

Q. Was it prior to your purchase of a call on Texas Gulf? A. I can't recall.

Q. Did Dr. Holyk himself tell you of this purchase? A. I believe he did, but I can't recall when it was he told me.

Q. Did you discuss the purchase of a call with any other person connected with Texas Gulf Sulphur Company prior to your purchase of this call? A. No, sir.

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(274) (Plaintiff's Exhibit 41 for identification received in evidence.)

Q. Mr. Huntington, getting back to this 10% net profits interest in the Hendrie Estate which the company offered $57,000 for in March, was that offer ever accepted? A. No, sir.

Q. I note in Plaintiff's Exhibit 41 that although it is stated, and I quote, "As a consequence thereof I am able to make a firm offer on behalf of the company to purchase the said interest for $57,000," that the method proposed to acquire the interest was simply to modify the original option agreement. A. Yes, sir.

Q. Was that offer subsequently changed to a firm offer simply to buy the 10% net profits interest for $57,000? A. Yes, sir.

Q. When was that done? A. April 9th.

Q. 1964? A. Yes, sir.

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(275) The Court: At April 9th the offer was to purchase the 10% for how much?

The Witness: $57,000.

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By Mr. Joseph:

Q. When was that offer finally rejected? A. June, 1964.

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Cross-examination by Mr. Marden:

Q. Mr. Huntington, would you give his Honor your reasons for buying the call on the Texas Gulf Stock on March 16, 1964, why you chose Texas Gulf stock as the subject of your call? A. Yes, sir. There were many favorable fac-

tors affecting the Texas Gulf Sulphur Company at the time.

Like motivation would apply to my purchase of the 50 shares.

Texas Gulf's primary producer of income at that time was sulphur, and it loomed to be the primary contributor of income for a substantial period of time. The sulphur business was experiencing the adjustment of supply and demand where the future looked very good indeed. At the end of the year the supply and demand (276) picture looked in balance and it looked as if the demand would increase very significantly, and the rumors were in the market place and otherwise that the price of sulphur was going to increase.

I had devoted a considerable amount of my time since coming with the company to our phosphate project in North Carolina. During the first few months with the company through the end of 1963 I had gone to North Carolina once or twice a month.

We had a very extensive land acquisition program down there in attempting to acquire reserves for any contemplated mining operation and we were spending a very significant amount of money down there. We were in the midst of a pilot plant operation with a hydraulic dredge machine which would go down through the overburden, which was 80 or 90 feet, and into the ore, and which would permit us to see just what the structure was composed of and its susceptibility to different mining methods, and this test-mining project had been completed and everything was very favorable, indeed.

We had a new potash mine in Utah with the indication that we would be into the potash ore virtually any day. There is a tremendous mine out there, (277) a beautiful mine, and we felt very confident that it would be a real asset for the future for us.

I had read the initial drafts of the proposed agreement with the Delhi Taylor Oil Corporation under which we would acquire approximately—well, different corporations that Delhi owned, but the net effect would give us the oil and gas rights on approximately 600,000 acres of land in Western Canada.

I sat in on the closing of the acquisition of the Marine Texan, our new sulphur carrier, in January of 1964.

Q. What is a sulphur carrier? A. This is an ocean-going ship that would haul somewhat over 23,000 tons of sulphur. Since the tragic loss of the Marine Sulphur Queen the previous year our transportation costs for sulphur had increased very substantially. The bringing of this ship into service meant that a million dollars or more in transportation costs could be saved a year.

We had exploration for oil and gas going on both in Western Canada and the Gulf Coast in addition to our exploration activities in Ontario, Baffin Island and elsewhere in the world.

Q. Did the activities at Timmins enter into your (278) thinking in deciding to buy this call on Texas Gulf stock? A. One buys a call or a stock in a company because of the entire company. To the extent that Timmins was a possibility, it was a factor, but I would have considered it—I considered it in connection with all of the other factors affecting the company at the time as a small or incidental one by comparison.

Q. You wouldn't class it as a major reason for your decision to buy that call? A. No, sir.

Q. Would the same be true of your purchase of stock of Texas Gulf Sulphur? A. Yes.

Q. Did it cross your mind, Mr. Huntington, either at the time you purchased shares of Texas Gulf stock or the call

about which counsel has questioned you that there was anything legally or morally wrong in your acquiring stock or a call on stock of your own company? A. No, sir.

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(279) Q. You bought some of your holdings of Texas Gulf in August, 1963, didn't you? A. October, sir.

Q. October of 1963? A. Yes.

Q. Before there had been any drilling at Timmins? A. Yes, sir.

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Redirect Examination by Mr. Joseph:

Q. Mr. Huntington, prior to March 16, 1964, had you ever purchased a call on Texas Gulf Sulphur stock? A. No, sir.

Q. Had you ever purchased a call on any stock? A. No.

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(280) JOHN A. MURRAY, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Joseph:

Q. Mr. Murray, what is your occupation, sir? A. I am the office manager at Texas Gulf Sulphur Company.

Q. How long have you been the office manager? A. I would guess maybe five or six years.

Q. Would you please trace for the Court your development within the company from your initial employment up to the present? A. I came to Texas Gulf Sulphur Company after working for two years with another outfit. I came in